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Supreme Court of the United States.

OCTOBER TERM, 1953.

No. 700.

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE; MITSUI STEAMSHIP CO., LTD.; KAWASAKI KISEN KAISHA; NISSAN KISEN KAISHA, LTD.; TOHO KAIUN KAISHA, LTD.; IINO KAIUN KAISHA, LTD.; MITSUBISHI KAIUN KAISHA, LTD.; KOKUSAI KAIUN KAISHA, LTD.; NIPPON YUSEN KAISHA; OSAKA SHOSEN KAISHA, LTD.; SHINNIHON STEAMSHIP CO., LTD.; YAMASHITA KISEN KAISHA; WILHELMSEMS DAMPSKIBSAKTIESELSKAB; A/S DEN NORSKE AFRIKA-OG AUSTRALIELINIE; A/S TONSBERG; A/S TANKFART I; A/S TANKFART IV; A/S TANKFART V; A/S TANKFART VI; SKIBASKTIESELSKAPET VARILD; SKIBASKTIESELSKAPET MARINA; AKTIESELSKABET GLITTRE; DAMPSKIBSINTERESSENTSKABET GARONNE; SKIBSAKTIESELSKAPET SANGSTAD; SKIBSAKTIESELSKAPET SOLSTAD; SKIBSAKTIESELSKAPET SILJESTAD; DAMPSKIBSAKTIESELSKABET INTERNATIONAL; SKIBSAKTIESELSKAPET MANDEVILLE; SKIBSAKTIESELSKAPET GOODWILL; DAMPSKIBSSELSKABET AF 1912 AKTIESELSKAB; AKTIESELSKABET DAMPSKIBSSELSKABET SVENDBORG; SKIBSAKTIESELSKAPET IGADI; A/S BESCO; AKTIESELSKAPET IVARANS REDERI; A/S LISE; THE DE LA RAMA STEAMSHIP CO., INC.; THE OCEAN STEAM SHIP CO., LTD.; THE CHINA MUTUAL STEAM NAVIGATION CO., LTD.; NEDERLANDSCHE STOOMVAART MAATSCHAPPIJ "OCEAAN" N. V.; THE SWEDISH EAST ASIA CO., LTD.; WATERMAN STEAMSHIP CORPORATION; LYKES BROS. STEAMSHIP CO., INC.; UNITED STATES LINES COMPANY; STATES MARINE CORPORATION; STATES MARINE CORPORATION OF DELAWARE; DAIDO KAIUN KAISHA; AMERICAN PRESIDENT LINES, LTD.,

Petitioners,

—against—

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., and EZRA TAFT BENSON, Secretary of Agriculture,

Respondents.

REPLY BRIEF OF PETITIONERS

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—against—

UNITED STATES OF AMERICA; ISBRANDTSEN COMPANY, INC.; and FEDERAL MARITIME BOARD, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONERS, JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, *et al.*

I

The pendency of proceedings before the Board are not a valid basis for the denial of certiorari.

In its Brief in Opposition respondent Isbrandtsen has urged that since the additional proceedings called for by the Board's order refusing to suspend the institution of the proposed contract/non-contract rates are now pending before the Board,[1] review of that order

[1] Although Isbrandtsen has described these proceedings as "approaching their conclusion" (Isbrandtsen Brief in Opposition, p. 24), a final determination will not be forthcoming for many months. Extensive briefs to the examiner were filed on May 24th. Prior to the Board's decision, an examiner's report must be prepared, after consideration of these briefs, over 4,600 pages of testimony and 146 exhibits, exceptions may be taken to the report by the parties, and thereafter briefs and oral argument presented to the Board itself.

by this Court is premature (Isbrandtsen Brief, pp. 23-4). The theory of respondent is apparently that since the lower courts decision will have no effect after the Board renders its final order on the proposal, it is not of sufficient importance to warrant review by this Court.

The legal issues raised by this case and the legal issues involved in the proceedings now before the Board which raise questions of whether and under what circumstances the Board should disapprove the use of contract/non-contract tariffs are separate and distinct. For example, the latter will not resolve the issue whether, as a matter of law, separate and prior approval of the use of a contract/non-contract tariff is required under Section 15 of the Shipping Act, 1916. Petitioners sought to emphasize in their petition and brief the far-reaching practical importance of the decision below—an importance wholly independent of and unaffected by what may be the outcome of the proceedings now before the Board (Petitioners' Brief, pp. 10-4). The day following the filing of the petition for certiorari in this Court, the Supreme Court of Oregon, relying upon the decision of the court below, ruled that a conference could not sue a shipper for violation of a contract entered into by the shipper in order to avail himself of a contract tariff, since the use of contract/non-contract tariffs by the conference was illegal, it not having been previously and specifically approved by the Board. *Pacific Westbound Conference* v. *Leval & Co.,* decision filed April 21, 1954 (58 Oregon Sup. Ct. Advance Sheets 677). For the convenience of the Court, this decision has been reproduced as an Appendix hereto. This decision demonstrates that the practical and far-reaching consequences of the decision of the Court

of Appeals for the District of Columbia Circuit—consequences which petitioner outlined in its petition —were not mere idle speculation but are already materializing so as to justify petitioner's original contention that the decision below is of such general importance to the foreign commerce of the United States and to the administration and construction of the Shipping Act, 1916, as to require its review by this Court.

II

There is no "decisive" precedent supporting the action of the court below.

Respondents have urged that the decision below is not novel and that *Isbrandtsen Co.* v. *United States,* 81 F. Supp. 544, appeal dismissed *sub nom. A/S Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.,* 336 U. S. 941 is "decisive" of the issues here presented (Respondent United States Brief, p. 10; Respondent Isbrandtsen Brief, p. 15).

That decision preceded the adoption by the Board of General Order 76. At that time there was no defined procedure whereby a shipper or competing carrier could protest the institution of a contract/non-contract tariff and obtain a suspension order from the Board against the adoption of the tariff even if the Board believed such action desirable. Indeed, that decision rested upon the finding that "the Commission disclaims the power to afford temporary relief" (81 F. Supp. at 546) against the adoption of the contract/non-contract tariffs there in question and the conclusion that the court, as a court of equity, could therefore fill the hiatus and act to maintain the status quo if the equities so demanded.

In its Motion to Affirm in that case (the only such motion that was filed), Isbrandtsen described the action taken by the District Court (at p. 4) as follows:

> "Therefore, in view of the fact that the Commission lacked power to prevent the carriers from inflicting irreparable injury upon the plaintiff pursuant to the approved agreements, the District Court, in order to preserve the status quo pending further Commission proceedings, temporarily suspended the Conference Agreements and temporarily enjoined defendant carriers from effectuating their threat to institute the exclusive patronage system."

In urging that the Supreme Court affirm that decision, Isbrandtsen argued (at p. 7):

> "In any case, it is familiar law that the application for an interlocutory injunction is addressed to the sound discretion of the trial court and that an order either granting or denying such an application will not be disturbed by an Appellate Court unless the injunction was improvidently issued. . . . Certainly the issuance of the temporary injunction here could hardly be considered an abuse of the admitted discretion residing in the District Court to preserve the equities before it."

This should be contrasted with the statement of Isbrandtsen on page 15 of its brief in this proceeding:

> "This [*Isbrandtsen* v. *United States*] was a square holding that an exclusive patronage system could not be effectuated prior to agency approval and judicial review of such agency action."

The language of the Department of Justice on pages 11 and 12 of its brief similarly ascribes this broad interpretation to the decision in *Isbrandtsen* v. *United States,* an interpretation Isbrandtsen did not rely upon in urging the Supreme Court to affirm that decision.

General Order 76 has, however, created a procedure whereby the Board and all interested parties are advised of the proposed adoption of contract/non-contract tariffs and which permits the Board to grant the exact relief, the absence of which at the time was the basis for the court's intervention and action in *Isbrandtsen Co.* v. *United States, supra.* The instant case thus raises issues wholly distinct from those presented in that case and the decision therein is in no wise here controlling. It is submitted that there is no precedent to support the action of the court below.

CONCLUSION

For the reasons stated above and for the reasons set forth in the petition for certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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